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In the Matter of:	)	Date: November 12, 1996
	)	
GARY PLEW	)	
Claimant,	)	
	)	Case No.: 87-DCW-177
v.	)	
	)	OWCP No.: 40-156600
NEW YORKER BAKERY	)	
Employer,	)	
and	)	
	)	
ORION GROUP,	)	
Carrier.	)	
	)	

APPEARANCES:

Gary Plew appearing *pro se*

Alan Sundburg, Esq.
For the Employer

BEFORE: MOLLIE NEAL
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act")[1] and the District of Columbia Workers' Compensation Act, 36 D.C. Code § 501 *et seq.* (1973). The Claimant filed an application for benefits in July of 1986 based on a back injury he sustained on the job in 1980. Administrative Law Judge Robert Shea held a formal hearing on November 20, 1987. Judge Shea

[1] Citations to the hearing transcript are designated "Tr."; Claimant's exhibits are designated "C-"; Employer's exhibits are designated "E-"; and citations to a previous Decision and Order will include the date of the decision followed by "D & O" followed by the page number.

issued a Decision and Order dated June 21, 1988, in which he granted Claimant, Gary Plew, temporary total disability benefits from July 17, 1986, until September 17, 1986, temporary partial disability compensation from September 18, 1986, until October 12, 1987, and permanent partial disability compensation from October 13, 1987. Employer, New Yorker Bakery, was ordered to pay Claimant's medical expenses pursuant to § 7 of the Act and to provide such additional services as Claimant's condition may require. Employer was further ordered to pay interest to Claimant in accordance with the Federal Courts Improvement Act, 28 U.S.C. § 1961 (1982). Claimant then requested modification of the June 21, 1988 Decision and Order pursuant to § 22 of the Act. On October 27, 1989, Administrative Law Judge Edward Terhune Miller held a formal hearing, after which he issued a Decision and Order granting Claimant's request for modification. Judge Miller ordered Employer to pay compensation to Claimant for temporary total disability beginning on January 22, 1988; past medical expenses, including chiropractic expenses; future expenses for reasonable and necessary medical care and treatment, including the cost of chiropractic services and diagnostic tests attributable to Claimant's back condition arising out of his October 1980 injury; and interest on all past due compensation. Following Judge Miller's decision, Employer filed a request for modification. Administrative Law Judge Reno E. Bonfanti held a formal hearing on August 13, 1991, and issued a Decision and Order on July 1, 1992, granting Employer's request for modification. Judge Bonfanti ordered that Claimant's temporary total disability award be amended to permanent partial disability beginning July 3, 1991, reducing compensation to be paid by the Employer and that Employer pay all reasonable and necessary medical care and treatment, including chiropractic services up to the date of the order, for Claimant's back injury arising out of the 1980 injury. Judge Bonfanti also found that on-going or continuous chiropractic treatments were not reasonable and necessary services under § 7 for any period after the date of the Order, but that Employer continued to be liable for short term chiropractic care following a "lock-up" or "acute exacerbation of the back problem." The Claimant requested modification on October 21, 1992, based on mistake of fact and change of condition under § 22 of the Act. On March 17, 1993, Judge Bonfanti held a formal hearing on the Claimant's modification request. By Decision and Order dated August 27, 1993, Judge Bonfanti ordered that Employer pay the Claimant temporary total disability under § 8(b) from May 4, 1992 to December 16, 1992, less prior payments, plus interest; permanent partial disability under § 8(c)(21) from December 17, 1992, and continuing, less prior payments, plus interest; and all medical services relating to the 1992 surgery for the work-related back condition under § 7 of the Act. Claimant appealed this decision to the Benefits Review Board ("BRB") on December 11, 1993, but later filed a motion on October 30, 1995, requesting that the BRB dismiss his appeal and remand the case back to this Office because he had filed a petition for modification on May 16, 1995. The BRB granted Claimant's motion by Order dated November 29, 1995.

On October 26, 1995, I held a formal hearing in Washington, D.C. Claimant appeared *pro se*. Employer/Carrier were represented by counsel. The findings and conclusions which follow are based upon an analysis of the entire record in light of the briefs of the parties, applicable statutes, regulations and case law in relation to those controverted issues that were in substantial dispute.

Issues

1. Are the various fill-in-the-blank questionnaire forms submitted by Claimant at the hearing admissible.

2. Has the Claimant produced enough evidence of a change in physical condition to prove he is entitled to a § 22 modification of the August 27, 1993 Decision and Order?

3. Has the Claimant produced enough evidence of a change in economic condition to prove he is entitled to a § 22 modification of the August 27, 1993 Decision and Order?

4. Has the Claimant produced enough evidence of a mistake of fact to prove he is entitled to a § 22 modification of the August 27, 1993 Decision and Order?

Findings of Fact and Conclusions of Law

Section 22 of the Act states that any party in interest may, within one year of the last payment of compensation or rejection of a claim, request modification of a compensation award for mistake of fact or change in condition. 33 U.S.C. § 922. The parties do not dispute that Claimant's request for modification if properly before this Office. The rationale for allowing modification is to render justice under the Act. *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). To that end, the trier of fact is given wide discretion to modify a compensation order. *O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 254 (1971). Section 22 was

> intended by Congress to displace traditional notions of *res judicata*, and allow the fact-finder, within the proper time frame after a final decision or order, to consider newly submitted evidence to further reflect on the evidence initially submitted.

Hudson v. Southwestern Barge Fleet Servs., 16 BRBS 367 (1984)(citations omitted). When reopening a claim, "a court must balance the need to render justice against the need for finality in decision making. . . ." *General Dynamics Corp. V. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982).

The party requesting modification has the burden of proof in showing a change in condition. *See Vaquez v. Continental Maritime*, 23 BRBS 428 (1990); *Winston v. Ingalls Shipbuilding*, 16 BRBS 168 (1984). The Section 20(a) presumption is inapplicable to the issue of whether a claimant's condition has changed since the prior award. *Leach v. Thompson's Dairy, Inc.*, 6 BRBS 184 (1977). *O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 254 (1971).

Non-final orders can be modified. Accordingly, it is permissible for a party to appeal a decision and order to the Board, a circuit court, or the Supreme Court and simultaneously seek modification under Section 22. *Craig v. United Church of Christ, Comm'n for Racial Justice*, 13 BRBS 567 (1981). The judge is not divested of jurisdiction over modification proceedings when an appeal is pending. *Wynn*, 21 BRBS 290; *Miller v. Central Dispatch*, 16 BRBS 63 (1984), *on remand*, 673 F.2d 773 (5th Cir. 1982), *rev'g* 12 BRBS 793 (1980); *Williams v. Geosource, Inc., Hunt Shipyard Div.*, 13 BRBS 643 (1981). Accordingly, although Claimant had an appeal of the previous modification order pending before the Board at the time he filed this modification petition, I retain jurisdiction to hear and decide this matter.

Admissibility of Claimant's fill-in-the-blank-questionnaire forms

Claimant submitted nine "Job Availability" questionnaires (C 7)[2], six "Job Search" questionnaires (C 8), an "interrogatory" of Dr. Howard Silby (C 6), and an "interrogatory" of Douglas Hilker (C 10). At the hearing, Employer objected to this evidence on the basis that, *inter alia*, the documents were not prepared under oath, the author was not present for cross examination, and Employer objected to the nature of the questions asked.

These questionnaires were prepared in anticipation of trial and are hearsay in that they are out of court statements by a witnesses offered in court for the truth of the matter asserted. The authors of the statements were asked to answer specific questions about events which occurred years ago, and the witnesses were not presented for cross examination. I left the record open so that Claimant could have the witnesses provide sworn affidavits signed before a notary. T-27. I also allowed Employer the opportunity to depose each of the witnesses. T-28. The Claimant did not provide sworn affidavits from the witnesses, but rather only had the witnesses have their statements notarized. This is not the same as having a witness swear, under penalty of perjury, to the truth and veracity of their statements. I note, however, that the employer elected not to depose these witnesses, despite being given the opportunity to do so.

Under common law, hearsay is generally not admissible except where there is an exception or exemption under the applicable rules. However, in conducting a hearing, the administrative law judge is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, excepted as provided by 5 U.S.C. 554 and the applicable regulations; but may make such inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties. 20 C.F.R. § 702.339. The rules of evidence are to be construed to ensure fairness in administration, eliminate unjustifiable expense and delay, and promote and develop the law of evidence to the end that the truth may be ascertained and proceedings justly determined. 29 C.F.R. § 18.102. Accordingly, hearsay evidence is generally admissible if considered reliable.

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[2] Although all of these forms were titled "job Availability Questionnaire" they were not all the same. For example, two out of the seven, one to the Music Arts Center and the other to Capitol Copy Products, consisted of only two yes/no questions. The other seven questionnaires consisted of five questions seeking more of a narrative type response.

Richardson v. Perales, 402 U.S. 389 (1971). As hearings before the administrative law judge follow relaxed standards of admissibility, the admission of evidence depends on whether a reasonable mind might accept it as probative. *Young & Co. V. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969).

The relaxed admissibility standard for hearsay evidence does not dispense with the right of cross-examination. *Southern Stevedoring Co. v. Voris*, 190 F.2d 275 (5th Cir. 1951). The opportunity to cross-examine has been required in cases involving the introduction of *ex parte* medical reports. *Avondale Shipyards v. Vinson*, 623 F.2d 1117 (5th Cir. 1980); *Southern Stevedoring Co. v. Voris*, 190 F.2d 275 (5th Cir. 1951); *Brown v. Washington Metro. Area Transit Auth.*, 16 BRBS 80 (1984), *aff'd* No. 84-1046 (D.C. Cir. 1984); *Darnell v. Bell Helicopter Int'l*, 16 BRBS 98 (1984), *aff'd sub nom.*; *Bell Helicopter Int'l v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT)(8th Cir. 1984). In *Longo v. Bethlem Steel Corp.*, 11 BRBS 654 (1979), the Board, relying on *Richardson v. Perales*, 402 U.S. 389 (1971), upheld the admission into evidence of *ex parte* medical reports, despite their hearsay nature. The Board reasoned that since the judge permitted a post-hearing deposition of the doctor to be taken, the right of cross-examination by the adverse party was protected. In general, the Board will affirm the admission and consideration of an *ex parte* report where the author is not biased and has no interest in the case, the opposing party has the opportunity to subpoena or cross-examine the witness, including post-trial, and the report is not inconsistent on its face. *Darnell*, 16 BRBS at 100. *See also Freezor v. Paducah Marine Ways*, 13 BRBS 509 (1981).

The Claimant made a good faith attempt to comply with my instructions to have the statements sworn and notarized. After reading the transcripts, I find that Claimant may have justifiably been under the impression that having the statements notarized would suffice. Additionally, I gave the employer the opportunity to depose the authors of each of the statements to protect its interest or avoid prejudice, but Employer elected not to do so. Accordingly, in the interest of fairness, I have admitted Claimant's fill-in-the-blank forms. However, I must weigh them in light of the fact that the witnesses were asked to testify to events which occurred over two and a half years earlier. Without the benefit of cross-examination, I have no way of determining how well each witness remembered all of the facts. I also do not have the benefit of cross examination which may have brought out additional facts omitted from the fill-in-the-blank questionnaire. Finally, I did not have the opportunity to observe the witnesses' demeanor at the hearing or generally evaluate their credibility.

Change in Physical Condition

Initially, I adopt all undisputed findings of fact set forth in the previous decisions and orders in this case. Modification based on a change in condition is granted where a claimant's physical condition has improved or deteriorated following entry of the award but before the request for modification. *See Rizzi v. Four Boro Contracting Corp.*, 1 BRBS 130 (1974).

In the previous Decision and Order on modification, Judge Bonfanti reviewed the medical evidence, which is summarized as follows: Dr. Dennis, a neurosurgeon, examined Claimant on August 27, 1991, and opined that Claimant could do sedentary to moderate work. After Claimant underwent surgery to excise a herniated disc, performed on February 10, 1992, Dr. Ammerman noted that Claimant was progressing satisfactorily, was capable of performing nonarduous sedentary work and would be an excellent candidate for vocational rehabilitation or retraining. On October 15, 1992, Dr. Ammerman again opined that Claimant was a good candidate for rehabilitation in nonardous work. Dr. Silby examined Claimant on December 15, 1992. Dr. Silby noted a limited range of motion, and concurred in 15 percent disability rating. Dr. Silby was of the opinion that Claimant could work full time in a light duty position where he would not have to interact with more than 10 pounds. Dr. Dennis examined Claimant on January 28, 1993, at which time Claimant reported improvement from the surgery and that he felt better. Dr. Dennis noted a significant restriction in range of motion amounting to a 14 percent whole body impairment, and opined that Claimant had the capacity to work sedentary to light duty occupations with lifting and carrying up to 30 pounds. In his deposition, Dr. Dennis testified that Claimant had reached maximum medical improvement by January 28, 1993. With regard to capacity to work, Dr. Dennis disagreed with Dr. Silby and Dr. Ammerman. Dr. Dennis testified that Claimant was restricted to sedentary to light duty occupations with lifting up to 30 pounds, rather than 10 pounds as suggested by Drs. Silby and Ammerman. Dr. Dennis also testified that Claimant had the capacity to perform the jobs of security officer, dispatch clerk, courtesy van driver, cashier, purchase agent, office assistant, inside sales, front desk clerk, and customer service representative, all of which were enumerated in the March 4, 1993 Labor Market Survey.

Judge Bonfanti asked the Claimant whether he could do any of the jobs that were previously identified in the November 23, 1990 Labor Market Survey presented at the previous hearing. Claimant stated "there's maybe a few of them that [he] could do." Specifically, Claimant admitted that he could be a car delivery driver (Tr. p. 65), employed by Rollins Shuttle Service, described on page 2 of the November 21, 1990 Labor Market Survey. With regard to the cashier position at Mr. Wash, described in the same survey, Claimant also stated that he was "sure that one would be okay to do." Tr. p. 66. Claimant also stated that for the car jockey position at Coleman Cadillac "I don't see any problem with that one." Tr. p. 66. Claimant also admitted that the delivery position for Acryldent would not be a problem so long as the packages were not over 15 pounds in weight. Tr. p. 66-67. Following Claimant's testimony, Karen Yano, a vocational expert, whose qualifications were stipulated to by the parties, testified and presented a Labor Market Survey dated March 4, 1993. This Labor Survey was a compilation of jobs that the vocational expert determined Claimant could perform given his education, experience and physical limitations. After reviewing Claimant's medical file, work and educational history, and current physical restrictions, the vocational expert compiled a list of jobs by reviewing a number job advertisements in the local newspaper. After screening the jobs based on Claimant's physical limitations as described in the medical evidence, the vocational expert contacted the employers and obtained complete job descriptions and salary information. C 9.

Given this medical evidence, Claimant's testimony that he felt better, and did not have the back lock-ups as before, and his admission that he could work some of the jobs listed by the expert, and the testimony of a vocational expert identifying various jobs within Claimant's residual functional capacity, Judge Bonfanti found that Claimant was capable of performing substantial gainful activity in regular employment in any number of jobs. In addition to the jobs that Judge Bonfanti found from the 1990 survey to be acceptable, and which Claimant admitted he could do, Judge Bonfanti found that Claimant could do the following jobs which were enumerated at the hearing, and outlined on the 1993 survey, requiring 10 or less pounds of lifting: security officer-Ogden Government Services, courtesy van driver-Ray Burnette Volkswagen, Cashier-Mr. Wash, security officer-Merrifield Center, purchase agent-Mid South, office assistant-Charles Products, inside sales-Gell Group, front desk clerk-ARA Services, and customer service representative-Capitol Copy Products. 8/27/93 D& O p. 5-6. This list of jobs coincided with the list offered by Dr. Dennis reviewed above.

Claimant must show that his condition has changed at some point between the August 27, 1993, Judge Bonfanti Decision and Order, and October 26, 1995, the date that I most recently held a hearing in this matter. Claimant's hearing exhibit number one begins with 1992 post surgery reports from Drs. Ammerman and Silby. Of course, while these reports were before Judge Bonfanti and bear on Claimant's condition at the time previous to the last hearing, they are instructive for purposes of comparing Claimant's current condition with his condition prior to Judge Bonfanti's Decision and Order. Dr. Ammerman reported on May 13, June 1 and July 23, 1992, that Claimant was progressing well and with no complaints. In his August 12, 1992 report, Dr. Ammerman noted that Claimant reported pain when he drives and goes over pot holes. Dr. Ammerman noted further that it may be impractical for Claimant to return to work as a route driver but that he could perform nonardous sedentary activity and that he was an excellent candidate for vocational rehabilitation or retraining. Again on October 15, 1992, Claimant complained to Dr. Ammerman of stiffness and soreness in his back, primarily in the morning when Claimant got up. Dr. Ammerman prescribed Relafen and noted again that Claimant was a good candidate for vocational rehabilitation. In relevant part, Dr. Silby noted in his report of December 17, 1992, that Claimant is able to work full time, but in a light duty position where he would not have to interact with more that 10 pounds. On December 22, 1992, Dr. Ammerman reviewed a lumbar CT scan of January 29, 1988, which he diagnosed as showing a herniated disc L-4, L-5. According to Dr. Ammerman, this CT scan was consistent with the February 19, 1992 lumbar myelogram, the May 2, 1991 lumbar CT scan and the April 27, 1989 lumbar CT scan. (C-1). All of the above evidence was before Judge Bonfanti.

Claimant's hearing exhibit number two contains two follow-up notes from Dr. Ammerman. In his follow-up note of October 6, 1994, Dr. Ammerman noted that Claimant reports "aching in his lower back and at times into the lower extremity." C-2. Dr. Ammerman's exam revealed moderate restriction of motion with tenderness, no spasms, straight leg raising moderately positive on the right, strength intact, and no Babinski. He then noted that Claimant was being referred to National Rehabilitation for a "rehab program." C-2. In his follow-up note of May 10, 1995, Dr. Ammerman noted Claimant's reports of pain and a possible recurrent disc

herniation. Dr. Ammerman stated that he cannot foresee Claimant returning to work as a route driver.

Claimant's exhibit three contains two reports from the Washington Imaging Center. The first report, dated February 2, 1995, is a report on an MRI. Dr. Monteferrante reviewed the MRI and reported that study was normal except for "probable small recurrent central and right lateral herniation of the intervertebral disc." However, this could not be confirmed without the post-contrast portion of the exam to which Claimant refused to submit. The second report, dated May 1, 1995, is a report on a CT scan by Dr. Klara Horvath-Pushkas. Dr. Horvath-Pushkas, noting the MRI report of a herniated disc, stated that what was being seen was "scar tissue rather than [a] herniated disc." Dr. Horvath-Pushkas did qualify her statement, however, by noting that the MRI is "suppose to be a more accurate" study. C-3.

Claimant submitted, at exhibit four, a series of medical reports from Dr. Silby. In his March 1, 1995 report after examining Claimant on January 26, 1995, Dr. Silby noted Claimant's report of pain and stated that this pain has been present since eight months after surgery, or approximately December of 1992. Dr. Silby noted moderate limited back range of motion and spasm but no focal findings. Dr. Silby reevaluated Claimant on April 4 and May 3, 1995 and reported his findings on May 10, 1995. Claimant reported stabbing pain. Claimant refused again to complete the post-contrast portion of the MRI. Limited range of motion was again noted. Dr. Silby's final diagnosis was "postoperative scar tissue on the right side at L5-S1. Dr. Silby stated that "[t]his was definitely accounting for [Claimant's] back pain and the findings noted on the exam." He further noted that the condition was not treatable. Dr. Silby opined that Claimant was "permanently totally disabled for any gainful employment as a result of this." Despite this opinion, on July 25, 1995, Dr. Silby reevaluated Claimant and reported on July 27, 1995, that he believed Claimant "could work if he would not have to interact with more that 10 lb. [sic]" Dr. Silby stated further that "[i]f such a job cannot be found then [Claimant] should retire on disability." Recognizing the conflict between his last two reports, Dr. Silby offered a statement on September 6, 1995 "to clarify potential confusion between [his] letters dated May 10, 1995 and July 27, 1995." Dr. Silby stated that he believed Claimant

> is a candidate for vocational rehabilitation where he could work in a sedentary position where he would not have to interact with more than 10 lb. [sic]. Previously I had used the word 'light duty' instead of 'sedentary.' Sedentary is the correct level of work. However, if such work cannot be found, then the patient would be, in my opinion, permanently and totally disabled. Therefore, his permanent disability is only granted by me after a bonafide attempt at vocational rehabilitation in a sedentary position has been attempted. . . .

C-4.

At exhibit six, Claimant submitted two fill in-the-blank interrogatory forms. The first was completed by Dr. Silby and dated August 23, 1995. Dr. Silby reported as his "main finding" that

Claimant has "limited back range of motion" with "moderate to moderately severe" pain. Dr. Silby indicated that Claimant can perform sedentary work, lifting no more than 10 pounds, on a sustained basis and has been so impaired for the last two years (approximately August 1993) and will likely remain so impaired permanently. Dr. Silby added his opinion that Claimant is not a "malingerer." C-6. The second form was titled "Physical Capacities Evaluation," and was also completed by Dr. Silby. Dr. Silby indicated on the form that in an eight hour work day, Claimant could, on a sustained basis, sit for six hours and stand or walk for three hours and lift up to five pounds frequently and ten pounds occasionally. Dr. Silby did not indicate any restrictions on Claimant's use of his hands or arms on a sustained basis, but placed limitations on Claimant's use of his feet for pushing or pulling. Dr. Silby also indicated that Claimant would need to rest for ten minutes out of every hour, but would not have to lie down for substantial periods during the day but should be permitted to lie down for five or ten minutes one or two times during the day. C-6.

Claimant also submitted a fill-in-the-blank form completed by Douglas Hilker. C 10. This is the same form completed by Dr. Silby. Mr. Hilker reports to be a vocational rehabilitation specialist but his qualifications have not been made a part of this record. Mr. Hilker's office reportedly reviewed Claimant's medical records. In response to the question whether Claimant could perform sedentary work, Mr. Hilker answered no. This is the same question to which Dr. Silby answered yes. Mr. Hilker qualified his answer, however, by stating that his opinion that Claimant could not perform sedentary work only applied "until Dr. Silby's statement from the report of 5-10-95 is overturned." As pointed out above, Dr. Silby did clarify his report of 5-10-95, in essence overturning it.

The Employer submitted exhibits numbered one through five. Exhibits two through five include medical reports from Drs. Ammerman and Silby, the MRI report and the CT scan report. Theses were also submitted by Claimant and were described above. Employer's exhibit one is a medical report by Dr. Gary London dated October 6, 1995. Dr. London examined Claimant on October 6, 1996 and reviewed his medical records. It was Dr. London's opinion that there has been no deterioration since the surgery of 1992. According to Dr. London's report, prior to surgery Claimant had "only pain and decreased range of motion of his low back, and that is what has continued, although the level of pain seems better." Dr. London stated that it was clear that "[claimant's] condition has not become worse" since the surgery. Dr. London went on to state that

> [b]ased on my review of the records, taking of a careful history today, and examining the patient I put forward the above diagnosis. It is clear to me that if properly motivated this patient is capable of leading a more active life. He is certainly capable of performing sedentary employment. I would not argue the point as to whether he can lift 10 or 30 pounds and would state that he can certainly lift at least 10 pounds.

E-1. Dr. London then reviewed the list of jobs in the March 4, 1993 Labor Market Survey presented by the vocational expert at the hearing and determined that the security officer, courtesy

van driver, cashier, purchase agent, office assistant, inside sales, front desk clerk and customer service representative jobs all conformed to the medical restrictions. These closely coincide with the jobs that Dr. Dennis approved and which Judge Bonfanti found the Claimant was capable of performing.

Claimant submitted a letter by Dr. Silby dated October 25, 1995, in which Dr. Silby essentially agreed with Dr. London's report, except that Dr. Silby pointed out that Dr. London did not discuss walking. Dr. Silby also questioned whether Dr. London could "categorically state whether or not a patient can conform to a certain job based on medical evaluation." Dr. Silby emphasized that "all one can do is state that a person might (emphasize the word 'might') be a candidate for such a job." Dr. Silby suggested that the only way to know for sure is to have the patient go through vocational rehabilitation and then take a job on a trial basis to see if he can perform the required duties.

Discussion - Change in Physical Condition

Initially, Employer argues that Claimant's alleged change in condition occurred before Judge Bonfanti's Decision and Order and is therefore, as a matter of law, not now subject to modification. As I now find that Claimant's condition has not changed for purposes of Section 22 modification, the issue of when any change in condition occurred is moot.[3]

The medical evidence presented by both Employer and Claimant is substantially identical. The extent of Claimant's disability described in the medical evidence presented during the previous modification proceeding and this modification proceeding is substantially identical. Claimant is described as suffering from back pain, limited range of motion and has been consistently restricted to non arduous sedentary work not requiring interaction with over 10 pounds. The only significant difference in any of the medical reports is a disagreement among some of the doctors on the weight restriction placed on Claimant. However, for purposes of the last modification proceeding, Judge Bonfanti only considered jobs meeting the most restrictive 10 pound limitation. This is the same limitation currently suggested by the medical evidence.

In his brief, Claimant argues that his range of motion has decreased to such a degree that he now qualifies for a modification under the Act. As evidence, Claimant relies on a comparison

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[3] However, I note that Dr. Silby reported on the August 23, 1995 fill-in-the-blank form that his "main finding" was that Claimant has "limited back range of motion" with "moderate to moderately severe" pain; that Claimant can perform sedentary work, lifting no more than 10 pounds, on a sustained basis; has been so impaired for the last two years (since approximately August 1993) and will likely remain so impaired permanently. C-6. Although this report does suggest that Claimant's current condition began at about the time the previous Decision and Order on modification was issued, inviting the inference that Claimant's condition changed in August of 1993, this report conflicts in part with Dr. Silby's report of March 1, 1995, wherein Dr. Silby states that Claimant's pain has been present since eight months after surgery, which would be approximately October of 1992. Given how close the dates are and the conflicts in the evidence, further development of the evidence on this issue would have to be developed before a decision could be rendered.

of doctor reports, the earlier of which describe the limits on his range of motion as "moderate" but which later reports describe the limits of his range of motion as "marked." I do not find this argument persuasive. I understand "moderate" to be somewhere between mild and severe, but "marked" to be simply a word used to describe something that has a noticeable character or otherwise clearly defined. The evidence does not support a finding that the doctors used the two words on a continuum, with marked defined as more severe than moderate.

I am also not persuaded by the evidence or Claimant's arguments that his pain has progressed to the extent that it rises to the level of a change in condition. Claimant's complaints of pain are described in almost all of the medical evidence. I do not find sufficient objective medical evidence of a progression or worsening of pain but merely differing descriptions of pain, some more specific than others. None of the medical evidence or descriptions of impairment indicate that the level of pain has changed significantly since the last modification proceeding. Accordingly, I find that there has not been a change in Claimant's physical condition such to warrant modification.

Change in Economic Condition

In *Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 16 BRBS 282, the Board held that a change in the claimant's economic condition may also be properly considered for Section 22 modification. The Supreme Court has also held that a petition for modification under Section 22 may be based upon physical or economic change. *Metropolitan Stevedore Co. V. Rambo*, 115 U.S. 2144 (1995), *rev'g. sub. nom.*, 28 F.3d 86 (9th Cir. 1994).

Claimant argues, in sum, that his separation from his wife has created a change in economic condition which entitles him to a Section 22 modification. I find that this is not an appropriate basis for modification under Section 22. The economic changes in the cases cited above were tied to the Claimant's wage earning capacity. For example, a claim for economic change may be heard when the claimant alleges that employment opportunities previously considered suitable are not suitable, or the employer contends that suitable alternative employment has become available. Additional expenses incurred or sources of support lost as alleged by the Claimant for purposes of this modification proceeding are irrelevant. When Claimant's award was granted, the fact of his marriage was not considered and is therefore obviously irrelevant on modification. A claimant's separation or divorce is not a proper consideration for determining a change in economic condition under Section 22.

Mistake in Fact

A mistake of fact is also a basis for a Section 22 modification. Authority to reopen proceeings extends to all mistaken determinations of fact. The standard for obtaining a modification for mistake of fact is the same as that for all modification proceedings: it must render justice under the Act. Although the fact finder has broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection

on the evidence initially submitted (*O'Keefe,*404 U.S. 254*; Jenkins*, 17 BRBS 183; *Dean*, 7 BRBS 234), an allegation of mistake of fact should not be allowed to become a back door route to retry a case. *O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 254, 255-56 (1971); *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976).

Claimant argues that Judge Bonfanti's reliance on the reports and testimony of a vocational expert was inappropriate and amounts to a mistake of fact. During the last hearing held by Judge Bonfanti, Karen Yano, a vocational expert whose qualifications were stipulated to by the parties (see transcripts from Judge Bonfanti's last hearing at page 69), testified that numerous jobs existed in the regional economy that were within Claimant's residual functional capacity. Although the jobs ranged from sedentary to light duty and had 10 to 30 pound lifting requirements, Judge Bonfanti only considered those jobs with the 10 pound requirements. (8/27/93 D & O p. 5). The vocational expert testified at the hearing. Judge Bonfanti had an opportunity to observe her demeanor, and the parties were allowed to conduct cross examination, and otherwise closely scrutinize her credibility and the credibility of her reports. Judge Bonfanti found the vocational evidence credible and convincing, and held that Claimant was capable of performing substantial gainful activity in regular employment in any one of a number of jobs in the regional economy, which he found to be available to Claimant in reasonable numbers. Judge Bonfanti pointed out that Claimant is an "intelligent, articulate, and well-educated young man" and he would have a reasonable opportunity to be hired for these jobs "if he were sufficiently interested." As discussed above, Claimant admitted during the last hearing with Judge Bonfanti that he could do some of the jobs enumerated.

Claimant submitted fill-in-the blank questionnaire forms that asked specific questions of persons purportedly employed by companies surveyed by the vocational expert. (C 7, 8). Claimant argues that these forms show that the jobs Judge Bonfanti found available and suitable as alternative employment, were actually not available or suitable.

Six of the questionnaires, titled "Job Search" questionnaires, do not appear to relate to jobs listed on either the 1990 or the 1993 Labor Market Surveys. These include jobs at Neal's Auto Parts, Marine Specialties, 84 Lumber, Staples, Bill's Hardware and Trak Auto. None of these jobs were credited by Judge Bonfanti as available suitable employment. Additionally, the record only contains notarized questionnaires from Marine Specialties and Staples. The notarized questionnaire submitted from Marine Specialists is not the same questionnaire presented at the hearing. The questionnaire presented at the hearing was signed by Jeanne Osborne, and was dated October 5, 1995. The questionnaire that was notarized and submitted later was signed by "Gordon AKA Sonny Osborne," was dated October 27, 1995 and was notarized by Jeanne Osborne. Finally, no job title or description is listed on the questionnaires. I therefore find that these six "Job Search" questionnaires fail to prove a mistake of fact.

Claimant also submitted "Job Availability" questionnaires from nine different employers taken from the list of 16 Employers on the 1993 Labor Market Survey. Generally these questionnaires ask the employer whether they were contacted by Ms. Yano, and whether Ms.

Yano described Claimant's work history, including "no clerical, typing, data entry or sales skills." Additionally, the employers were asked whether Ms. Yano told them that Claimant had undergone back surgery and whether she had described in detail all of Claimant's limitations. Finally, the questionnaire asked employers whether, given all of the information describing Claimant, the employer would have hired the Claimant.

There are a number of problems with the questionnaire itself, as it relates to its value as evidence. First, questions two, three and four, which deal with the extent to which Ms. Yano described Claimant and his qualifications and limitations to the employer, are irrelevant. The vocational expert does not need to reveal to the employer any information about the claimant to complete a reasonable labor market survey. It is only necessary that the expert be aware of the claimant's age, education, industrial history, and physical limitations when exploring the local opportunities. *Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985). What is relevant is whether the expert properly understood the nature of the job and whether that job matched the physical limitations of the Claimant, and Claimant's skills, education and experience. As pointed out above, the vocational expert was fully aware of Claimants education, experience, medical history and physical limitations. Additionally, the questionnaires fail to show any significant discrepancy or inconsistencies in the vocational expert's understanding of the job duties. Where discrepancies do exists, Claimant's evidence is insufficient to discredit the vocational experts evidence such to qualify as a mistake of fact. Second, the Claimants's qualifications described on the questionnaire are those characterized by Claimant himself, and which have not necessarily been established as a matter of fact. Specifically, Claimant describes himself as "having a high school education with no other skills." This fact has not been established as a matter of record, and based on Claimant's *pro se* prosecution of this matter, I cannot presume that he is without any other skills other than those he gained as a bakery route truck driver and a maintenance mechanic. Last, these questionnaires ask detailed questions about events that occurred almost three years prior. Without exception, the respondents to the questionnaires indicated some uncertainty, and most simply did not remember anything about being contacted by Ms. Yano. The questionnaires also essentially require the employer to speculate about whether Claimant can do a certain job based on certain generally described limitations. This type of speculation is generally reserved for experts such as Ms. Yano, rather than a prospective employer or Claimant himself. Accordingly, these questionnaires provide little support for Claimant's contention that there was a mistake of fact.

Turning to each of the questionnaires specifically, all but one of the questionnaires, Music Arts Center, is notarized. I cannot discern from the record why Claimant selected these nine employers to complete his questionnaire. There were 16 employers on the 1993 survey. Of those 16, Judge Bonfanti found that the following nine positions were suitable for Claimant: security officer-Ogden Government Services, courtesy van driver-Ray Burnette Volkswagen, Cashier-Mr. Wash, security officer-Merrifield Center, purchase agent-Mid South, office assistant-Charles Products, inside sales-Gell Group, front desk clerk-ARA Services, and customer service representative-Capitol Copy Products. (8/27/93 D& O p. 5-6). However, Claimant failed to send a questionnaire to Ogden, Mr. Wash, Gell Group or ARA Services, despite the fact that Judge

Bonfanti found that these employers had jobs available which were suitable for Claimant. Accordingly, with the exception of Claimant's unsupported assertions in his brief, Claimant submitted no evidence that these jobs were not suitable alternative employment or that a mistake of fact was made with regard to these jobs. I also cannot discern from the record why Claimant sent questionnaires to Auto Parts Center, Progressive Mini Storage, Music Arts Center and Zeibart, all companies which were offering jobs that were not listed as suitable by Judge Bonfanti in his last Decision and Order. Even if I were to credit Claimant's questionnaires as establishing that these jobs were not suitable alternative employment, the point would be moot because Judge Bonfanti did not consider these jobs as suitable alternative employment. In sum, Claimant sent questionnaires to nine out of 16 employers on the 1993 survey; four of whom offered jobs not at issue. Claimant failed to send questionnaires to four other employers that offered jobs found by Judge Bonfanti to be suitable.

The questionnaire evidence dealing with the four companies that were offering jobs not considered suitable by Judge Bonfanti is irrelevant in that it does not deal with a position that was at issue. At best, this evidence could go to the overall credibility of the 1993 Labor Market Survey. However, these questionnaires fail to show that Judge Bonfanti's reliance on the Labor Market Survey amounted to a mistake of fact. Auto Parts Center indicated in the questionnaire that they had talked to Ms. Yano, but they were not certain about the medical and vocational history that Ms. Yano provided to them. In response to Claimant's question about whether he would have been offered a job based on his self-described limitations and skills, the Auto Parts Center indicated that "after reviewing [his] qualifications, we would have been able to offer [him] only a delivery driving position with our firm." The Auto Parts Center indicated that the counter sales job required product knowledge and some lifting over 30 pounds. This description does not differ significantly from the description noted in the Labor Market Survey by Ms. Yano. According to the position description in the Labor Market Survey Claimant could

> sit or stand at the counter where he waits on the customers. Experience in aftermarket sales of automobile equipment is **preferred**. Although some of the work may entail some lifting (like brake drums), all employees are encouraged to ask for help if the lifting is more than the individual believes he can handle safely. . . . Customer service ability is considered more important than strength for this position.

(Emphasis added).

Progressive Mini Storage did not recall speaking with Ms. Yano and did not respond to any of the questions. Their only comments were that furniture would have to be lifted and moved around, that clerical experience was helpful but not required and that the name of the company was now The Vault Storage and has been so named since "late 1990." The Labor Market Survey reflected essentially the same description but it was noted on the Labor Market Survey regarding the lifting and moving of furniture that "the individual would not have to be doing this by himself, and the frequency of this demand is generally only twice a week."

Ziebart responded that they did not recall Ms. Yano specifically calling but that they thought someone had called regarding Claimant's case. In response to the limitations described by the Claimant and the question of whether Claimant would be hired with such limitations, Zeibart responded that they "doubt that [they] would have considered the candidate." Zeibart commented that they could "not recall the specific conversation." The Labor Market Survey indicated that an employee would need some technical skills dealing with the product and customer service skills, particularly dealing with the customers in a professional manner.

The Music and Arts Center responded to a yes/no, two question questionnaire from Claimant. They stated that they had no recollection of being contacted by Ms. Yano but that lifting, driving and computer skills were necessary. No specifics about the amount or frequency of lifting, the distance and amount of driving or the level of required computer skills were given. The Labor Market Survey indicated occasional pulling of stock and assistance in driving and that lifting of over 30 pounds was not required and the individual could ask for help.

These four questionnaires were not sent to employers who were offering jobs considered as suitable alternative employment by Judge Bonfanti. Additionally, the responses provided by the employers do not vary so significantly from the information on the Labor Market Survey so as to impeach the credibility of the Labor Market Survey itself. As would be expected after three years, most employers simply did not recall enough detail to provide meaningful responses or lend support to Claimant's argument that a mistake of fact occurred.

Five questionnaires were relevant in that they were sent to employers that were offering jobs that Judge Bonfanti considered suitable. Charles Products was offering an office assistant job. They did not retain records of the telephone call with Ms. Yano and could only state that if Claimant "did not possess computer skills" he would not have been qualified for the position. No details were set forth as to the level of computer skills required. The Labor Market Survey indicated that the Charles Products only required customer service, order entry, math and some clerical skills. I cannot be sure that the same person was contacted for both the Labor Market Survey and for the Claimant's questionnaire. Judge Bonfanti and the vocational expert found that this job was suitable alternative employment. The vague and generally incomplete answers to the questionnaire do not establish that Judge Bonfanti's reliance on the Labor Market Survey was a mistake of fact.

Ray Burnette Volkswagen also had no records of Ms. Yano contacting them. They commented, however, that "the hours sitting and driving are to [sic] long," and that the employee would have to "lift any suitcases necessary." The frequency lifting and the weight of the "suitcases" were not mentioned. The drivers shuttle customers between the dealership and the Pentagon or Crystal City. If any, suit cases are more likely brief cases, but not enough information is provided to determine this point. The hours were reported on the questionnaire to be from 7:00 a.m. to 6:00 p.m. with five minute only intervals. According to the Labor Market Survey, the hours were split shifts of four hours each (7:00 am -10:00 a.m. and 3:00-6:00 p.m.) and the frequency depended on customer needs. No mention of suitcases was made. The

employer does not provide enough information on the questionnaire to allowing me to find a mistake of fact. Although there is a minor discrepancy in hours, I find no reason to discredit the Labor Market Survey in favor of the employer narrative on the questionnaire.

Mid South could not specifically recall Ms. Yano calling, but did comment that it would be a problem if the employee could not sit for periods of time "because the quantity of orders to be keyed in, the person could not be taking breaks on a continueous [sic] basis." The employer also commented that "the person's typing was not good enough for order entry." The Labor Market Survey states that only "some data entry" is involved, "but mostly the individual needs common sense in solving delivery and supply problems" and an "ability to deal with suppliers." Again, I do not find this information specific enough to determine that a mistake of fact was made. Claimant's typing speed and or accuracy is not reflected in the record, nor does the employer indicate how long a period an employee would have to sit. Dr. Silby indicated that Claimant could sit for six hours on a sustained basis in an eight hour day. C 6. I cannot determine from the questionnaire whether Claimant's ability to sit for six hours would have been adequate for this employer. I also find no reason to believe that Claimant cannot deal with suppliers and I assume that Claimant has common sense. I find no reason to give the employer's response on the questionnaire more weight than its first response to the professional vocational expert, that experts opinion, and the opinion of Judge Bonfanti.

Merrifield Center could not answer the questionnaire adequately because they reported to have a new staff. Mr. Bean responded to Claimant's questionnaire, but I have no information on the person contacted for the Labor Market Survey. Merrifield Center reported the current job as requiring a person to be physically fit, able to walk and drive patrols. I find no reason to believe, based on this information, that Claimant could not walk and/or drive patrols. Dr. Silby stated that in an eight hour day. Claimant could walk for three hours on a sustained basis. C 6. I also cannot be sure that the position now described by the new staff is similar to the position available three years prior. According to the previous job description reported on the Labor Market Survey, the security officer is a lobby attendant that occasionally makes a patrol on foot or in a vehicle. These duties are clearly within Claimant's residual capacity.

Capitol Copy Products responded to a yes/no, two question questionnaire from Claimant. They stated that they could not recall being contacted by Ms. Yano but that the position "would require typing and data entry knowledge" and that based on Claimant's self described lack of "clerical, typing, data entry or sales skills," Claimant would not be hired No other information was provided. The Labor Market Survey indicated that the job only required good telephone skills and attention to detail. No contact person was listed in the Labor Market Survey, so I cannot be sure that the same company representative was surveyed by both parties. Additionally, the job listed in the Labor Market Survey was Customer Service Representative. The job listed on the questionnaire sent to Capitol Copy Products was Maintenance, although the same job description appeared on both. I find no reason to assign more weight to the information provided on the questionnaire than to the information provided by the vocational expert on the Labor Market Survey. So far as the record does not reflect that Claimant does not have good telephone

skills and attention to detail, I cannot find that Judge Bonfanti's determination that this job was suitable alternative employment was based on a mistake of fact.

The record contains no questionnaires on the remaining seven jobs listed on the Labor Market Survey. Four of those seven; security officer-Ogden Government Services, Cashier-Mr. Wash, inside sales-Gell Group, and front desk clerk-ARA Services, (8/27/93 D& O p. 5-6), were considered as suitable alternative employment by Judge Bonfanti. Each of these jobs meet Claimant's residual capacity as described in the medical evidence, particularly given Dr. Silby's opinion that in an eight hour day, claimant can, on a sustained basis, sit for six hours, and or walk for three hours. Claimant submitted no evidence of a mistake of fact with regard to these positions,[4] and I find no reason to discredit the previous testimony of the vocational expert on these jobs, or find that Judge Bonfanti's reliance on the Labor Market Survey was a mistake of fact.

The Ogden security officer position was a lobby security position. I find no evidence that Claimant could not do this job. The Mr. Wash Car Wash job was a simple cashier position requiring that the employee make change for customers. There is no indication that Claimant would not be able to sit for the required periods of time. The inside sales job at Gell Group required good communication skills. The employee in this position would be a clerk, responsible for taking orders for big event ticket sales. I have had the opportunity to observe Claimant's written and oral communication skills during the pendency of this proceeding and find no reason why he could not do this job. The record does not contain evidence that Claimant's communication skills are inadequate for this position. Finally, the ARA front desk position required an employee to register guests, answer questions, collect money and process credit cards, and on occasion, set up rooms. Nothing in the evidence indicates that Claimant could not do this job. Most of the positions described were clerical in nature. These positions appear to be within Claimant's residual capacity to perform. I find nothing in the evidence that demonstrates that Claimant does not have basic clerical skills. I find no evidence that Judge Bonfanti's reliance on the Labor Market Survey in his determination that these jobs were suitable alternative employment was not a mistake of fact. As I have found that nothing has changed with Claimant's physical condition, it follows that he can still do these jobs.

The trier of fact may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. *Turney v. Bethlehem Steel Corp.* 17 BRBS 232, 236 (1985); *Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985). The vocational expert conducted a labor survey and identified specific available jobs. *Campbell v. Lykes Bros. Steamship Co.* 15 BRBS 380 (1983). The vocational expert was sufficiently aware of Claimants abilities and restrictions. A judge may credit a vocational expert's opinion even if the expert did not examine the claimant, as long as the expert was aware of the claimant's age,

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[4] In his brief, Claimant generally stated that these jobs were unavailable because he either lacked the skills or expertise required, or could not do the job because of his physical limitations. Claimants Supplemental Post-Hearing Brief at p. 7. I find that these statements are not supported by substantial evidence.

education, industrial history, and physical limitations when exploring the local opportunities. *Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985). In *Hogan v. Schiavone Termainl*, 23 BRBS 290 (1990), the employer was held to have met its burden of showing suitable alternative employment even though the vocational expert met with the claimant for only one hour, did not personally contact prospective employers, made none of the job opportunities he found known to the claimant, did not test the employee for manual dexterity or intelligence, and did not know if the claimant could read or write. The Board reiterated that an expert need not examine the claimant, as long as the expert is aware of the claimant's age, education, industrial history, and physical limitations when exploring local job opportunities. As an employer is not required to place a claimant in suitable alternative employment, the fact that the claimant was not informed of the identified positions was found to be irrelevant. The Board also noted that the LHWCA includes no requirement that a vocational expert contact prospective employers directly.

I find that Judge Bonfanti properly considered the vocational experts testimony, the medical evidence and that no mistake of fact exists.

Attorney's Fees

Section 28 of the Act provides the only authority for an award of an attorney's fee to a claimant's attorney. As Claimant is not an attorney, he is not eligible for an award of attorney's fees. However, certain expenses may be recoverable provided they are adequately documented. Claimant's request to file a petition for the recovery of certain expenses is hereby GRANTED.

Order

After reviewing the evidence and arguments, I find that Claimant has not proved a change in physical or economic condition and I find no mistake of fact. Accordingly, Claimant's petition for modification is hereby DENIED.

So Ordered.

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MOLLIE W. NEAL
Administrative Law Judge

MWN/rpf